United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: June 30, 2006

TO : Celeste Mattina, Regional Director
Region 2

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SUBJECT: New York Post
Case 2-CA-37103

This case was submitted for advice regarding whether the Employer violated Section 8(a)(1) of the Act when it withdrew a permissive bargaining proposal to voluntarily recognize the Union after the Union solicited a signed authorization card from an employee in the proposed unit.

We conclude that the charge should be dismissed, absent withdrawal, as the evidence does not establish that the Employer withdrew its recognitional bargaining proposal in retaliation for the exercise of Section 7 rights, but rather because it believed the Union violated an interim agreement not to solicit new authorization cards.

FACTS

Background: 1973 Collective-Bargaining Agreement; 1993 Collective-Bargaining Agreement and Grottola Side Letter

The New York Typographical Union, CWA Local 14156 ("Union") represented composing room employees working for the New York Post ("Employer") for about 100 years. Over time, computerization decreased the need for employees with manual composing room skills. In their 1973 collective-bargaining agreement, the parties addressed workplace changes accompanying modernization. In that agreement, the Union agreed not to oppose automation, and the Employer agreed to guarantee lifetime jobs for existing composing room employees.

In a 1993 collective-bargaining agreement, the parties agreed on additional measures for the composing room employees. That agreement contained a side letter, known as the Grottola letter, in which the parties agreed that the composing room employees would continue to be covered by the provisions of the collective-bargaining agreement even if they transferred to other departments and even if their functions changed. The parties also agreed that the Union could refer qualified applicants to new positions who, if hired, would still be covered by the contractual provisions for such items as vacation, holidays, sick

leave, pension, and several other specified terms. Finally, they agreed that the Employer's offering of positions to Union members in non-Union areas did not mean that the Union would represent employees in those areas.

1997 Consent Award Resolves Disputes over Employer Application of Grottola Letter

As the Employer introduced new technology and created new departments and new jobs, the Union asserted that the Employer did not apply the Grottola Letter. At the same time, the number of composing room employees declined through attrition and voluntary separation agreements. Between 1993 and early 1997, the Union filed grievances over the Employer's alleged repeated failure to comply with the 1993 Grottola Letter's agreement to hire Union referrals.

In a February 1997 settlement of these grievances, the parties entered into a consent award before an arbitrator. In that award, the parties agreed that the 1993 contract with Grottola Letter would cover those employees referred by the Union to the Employer's Information Systems Group ("ISG") and two other departments, as well as employees hired in the three departments who were not referred by the Union, but who subsequently signed Union authorization cards and requested that the contract apply to them.

2002 MOA and the Total Contract

On January 30, 2002, the parties entered into an agreement effective until December 31, 2004, known as the 2002 Memorandum of Agreement ("MOA"). The MOA applied to the Union-represented employees working at the Employer's Manhattan facility.[1] In that regard, the MOA referred to the entire collective-bargaining agreement ("the Total Contract") between the parties as consisting of the 1993 collective-bargaining agreement, as amended and modified by the Grottola side letter and such later agreements as the 1997 consent award, with the proviso that the terms of the MOA would supersede any provision of the Total Contract that MOA terms modified or amended. The Total Contract continued to apply to employees working under a lifetime guarantee who

[1] The parties also entered into an agreement with a term from January 2002 to December 2006 for the Employer's Bronx production facility which, since it was built in 2001, did not have a composing room. Under this collective-bargaining agreement, the Union represented employees working in the Employer's Production Technology Department. Those employees performed work on computers, networks, etc.

transferred to the ISG, Union referrals to the Employer's ISG, and employees represented by the Union.[2] The MOA extended the Total Contract to December 31, 2004.

By 2003, following a continuing decline in the Employer's composing room work, the Employer had transferred the remaining composing room employees who were working under lifetime guarantees to other departments.

Two ISG Employees Sign Authorization Cards in August 2004; the Union Seeks Arbitration over their Contract Coverage; Parties Hold Arbitration in Abeyance

In early August 2004, two employees working in the Employer's ISG in Manhattan signed union authorization cards. Neither employee was working under a lifetime guarantee. Shortly thereafter, the Union requested that the Employer apply the contract to these two employees. The Employer refused, asserting that the 1997 consent decree, which required the Employer to apply the contract to employees who signed authorization cards, no longer applied because the 2002 MOA superseded the consent decree.[3]

The Union sought arbitration over the Employer's refusal to apply contractual provisions to the two employees. The parties agreed to hold the arbitration proceeding in abeyance while they tried to resolve the issue of the two employees in the context of bargaining for a new contract.

Bargaining for Successor to MOA; Employer Asserts No Employees Work under MOA; Parties Reach Status Quo Agreement

In December 2004, the 2002 MOA expired. During bargaining for a successor contract, the Employer's representative said the following to the Union's representatives:

> A union environment is inconsistent with my philosophy that technicians should not be

[2] Under the MOA, the requirement that the Employer request Union referrals for future job openings in Manhattan would only apply to the ISG, and not to the two other departments.

[3] In relevant part, the 2002 MOA states that the "Grottola letter, for departments which are not represented by a Union, shall continue to apply to Guaranteed employees transferred to the ISG, ISG employees currently represented by the Union and union referrals hired into the ISG."

> retained but should work at the Employer for a period of time and then move on. A union contract would inhibit my ability to recycle technicians. I don't want a union in the department because I believe that a union presence would make recruitment difficult.

After this remark, the parties continued to meet and bargain.

On January 13, 2005,[4] the Employer informed the Union that the two remaining Union-member employees working in Manhattan were no longer covered by the contractual lifetime guarantees, as most recently referenced in the Grottola letter, because their duties assertedly were more sophisticated than regular unit work. The Employer took the position that it consequently no longer employed employees in Manhattan who were working under the Union contract.

By letter dated January 18, the Union filed a grievance regarding the removal of the two employees from contract coverage, stating that the Employer's position was contrary to its earlier view that the contract covers nonmanagerial employees, regardless of their positions. One of the two involved employees resigned. The parties agreed to maintain the status quo, pending contract negotiations and the final settlement of the outstanding grievances ("status quo agreement"). Under the Employer's interpretation of that agreement, the parties intended to include not seeking representation for more employees in the ISG. The Union claims that the status quo agreement only applied to the employees who already were the subjects of the pending grievances.

May 2005 Bargaining Sessions

At a May 9 bargaining session, the Union proposed that the Employer recognize it as collective bargaining representative for all employees in the Employer's Bronx and Manhattan facilities whose work functions included the maintenance and support of computer systems, networks, and software. Except arguably for a provision regarding new hires, the Union's proposal did not contain terms of employment.

At a May 18 session, the Employer proposed, in part, that when the Union "recruits into membership a majority of the employees in the job classification, the Union will be recognized as the bargaining representative for those

[4] All remaining dates are in 2005, unless otherwise noted.

employees." The proposal also stated that the Employer did:

> not acknowledge or admit for any purpose that employees in a particular job classification or partial groups of job classification in the ISG constitute an appropriate bargaining unit . . . and that this agreement of the parties creates certain, limited contractual representation rights for the Union and does not constitute an[] agreement that the employees the Union may represent constitute an appropriate unit . . . .

The Employer proposal further stated that the Employer was willing to permit the Union to represent certain ISG employees provided certain conditions were met, but that employees promoted or reassigned into such groups as planning and architecture would not be represented by the Union.

Union Solicits Authorization Card from ISG Employee

In June, the Union obtained an authorization card from an ISG employee who was neither an employee working under a lifetime guarantee nor a Union referral. By letter dated June 16, the Union asked that the Employer apply the contract to that employee and that the Employer agree to add that employee to the existing grievance regarding the two remaining employees who had earlier signed authorization cards, rather than filing a separate grievance.

In late June, the Union contacted the Employer to schedule bargaining sessions. In response, the Employer stated that the bargaining had not gone well, and that because the Union had solicited an authorization card from a third employee, the Employer was withdrawing its May 18 proposal to recognize the Union as the representative of employees at the Manhattan location. On July 6, the Union objected to the Employer's position. On July 11, the Employer withdrew its recognitional proposal for the Manhattan location. On July 13 and August 1, the Union filed and amended the instant charge alleging, in part, that the Employer's withdrawal of its recognitional proposal violated Section 8(a)(1) because as it was in retaliation for the protected activity of soliciting authorization cards.

The Employer contends that the Union violated the parties' agreement to maintain the status quo while they were engaged in discussions by soliciting the new employee to sign an authorization card. During contract negotiations, the Employer had explored with the Union

whether they could lawfully create a new bargaining unit in which the Employer would recognize the Union after the Union had obtained majority support. In those circumstances, the Union's request for extension of the contract terms to the third employee assertedly violated the agreement to maintain the status quo while discussions progressed.

ACTION

We conclude that the charge should be dismissed, absent withdrawal, as the evidence does not establish that the Employer withdrew its recognitional bargaining proposal in retaliation for the exercise of Section 7 rights, but rather because the Employer reasonably believed that the Union violated an interim agreement not to solicit new authorization cards.

In Wright Line,[5] the Board set forth its test for cases alleging violations of the Act that turn on employer motivation. Under that test, to establish that the Employer's withdrawal of the proposal was unlawful, the General Counsel would have to show by a preponderance of the evidence that the Union's solicitation of the authorization card was protected activity and a motivating factor in the Employer's decision to withdraw the proposal.[6] If the General Counsel made that showing, the burden of persuasion would shift to the Employer to show, by a preponderance of the evidence, that it would have taken the same action even in the absence of the union or protected activity.[7]

Employer motive is the critical question in cases where both unlawful and legitimate reasons are proffered for an employer decision, and that motive may be inferred from the totality of circumstantial as well as direct evidence, considering such factors as an employer's knowledge of the union or protected activity; the employer's expressed hostility toward the union; past employer action regarding

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[5] Wright Line, 251 NLRB 1083, 1088 n.12 (1980), enforced on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in NLRB v. Transportation Mgmt Corp., 462 U.S. 393, 399-403 (1983).

[6] Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004); Wright Line, 251 NLRB at 1089.

[7] Central Plumbing Specialties, 337 NLRB 973, 974 (2004); W.F. Bolin Co., 311 NLRB 118, 119 (1993), enf'd mem. 99 F.3d 1139 (6th Cir. 1996).

similar activity; and the timing of the employer's conduct.[8] And, if there is evidence that an employer's justification is no more than a sham or a pretext to mask its unlawful conduct, it can be used to counter and diminish the employer's ability to meet its burden of persuasion that it was actually motivated by a legitimate reason.[9] Thus, if the stated justification fails to withstand scrutiny, it can be "infer[red] that there is another [unlawful] motive . . . that the employer desires to conceal . . . ."[10]

Applying the above principles, we assume, without deciding, that an employer's withdrawal of a proposal to establish a unit on which to base collective bargaining, a permissive subject of bargaining on which both parties must agree, might constitute a violation of the Act. We further assume, without deciding, that the General Counsel could satisfy the prima facie burden of establishing that a motivating factor for the Employer's conduct was the arguably protected securing of an authorization card and request for representative status. In the circumstances here, however, we conclude that the Employer's withdrawal of its recognitional proposal did not violate the Act because the Employer could, by a preponderance of the evidence, establish both a legitimate business justification for its conduct and that it would have taken the same action absent union or protected activity.

As a preliminary matter, the General Counsel's initial burden of showing that the Union's solicitation of the authorization card was a motivating factor in the Employer's conduct arguably is met by the evidence showing the Employer's knowledge of the protected activity; the Employer's expressed hostility toward the Union; and the timing of the Employer's conduct. The Employer was aware of the Union's solicitation of an authorization card by the

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[8] See, for example, Healthcare Employees Union v. NLRB, 441 F.3d 670 (9th Cir. 2006); Valmont Industries, Inc. v. NLRB, 244 F.3d 454, 472 (5th Cir. 2001) (employer departed from progressive discipline policy by issuing a written, rather than oral, warning to first time offender); Van Dyne Crotty Co., 297 NLRB 899, 899 (1990).

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[9] Wright Line, 251 NLRB at 1084. The Board has also held that evidence of pretext is part of the General Counsel's burden of persuasion. See, e.g., Ellis Electric, 315 NLRB 1187, 1187 n.2 (1994).

[10] Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966). Accord Wright Line, 251 NLRB at 1088 n.11, 1089 ("the absence of any legitimate basis for an action . . . may form part of the proof of the General Counsel's case").

Union's request that the contract be extended to cover that individual, and the Employer demonstrated antiunion animus and/or an antipathy to collective bargaining by its representative's statement during bargaining that its management philosophy was "inconsistent" with unionization. The timing of the Employer's conduct also supports the conclusion that unlawful considerations motivated its action -- the Employer withdrew its proposal shortly after the Union's solicitation of an authorization card from an employee.

Nonetheless, a preponderance of the evidence also shows that the Employer had a legitimate justification for withdrawing the proposal, and that it would have withdrawn the offer in the absence of the protected activity here, if the Union engaged in conduct that undermined or was in contravention of the parties' agreement as to how to resolve their disputes. The Employer withdrew the proposal because the Union had violated the parties' status quo agreement that included resolving disputes over who was to be covered by the terms of the parties' collective-bargaining agreement as part of overall discussions concerning a successor agreement to the 2002 MOA.

The Employer has advanced a legitimate reason as the motivation for the conduct -- that is, it withdrew the proposal because the Union breached the parties' status quo agreement. There is no evidence showing that the Employer's interpretation of the agreement was incorrect. Under its interpretation, the parties had agreed to resolve all grievances in the context of the discussions concerning the collective-bargaining agreement. In essence, the parties had bargained over, and reached agreements on, similar questions of employee contract coverage with their 1973 collective-bargaining agreement, the 1993 Grottola Letter, the 1997 consent award, and the 2002 MOA.

Based on these particular circumstances, we conclude that the Employer has demonstrated that it was not the arguably protected conduct of soliciting an authorization card that provoked the withdrawal. Rather, the Union's solicitation of yet another employee's authorization card, while two previous grievances concerning the Employer's obligation to extend the contract to other employees had been held in abeyance pending contract negotiations, apparently was in contravention of the status quo agreement. In the Employer's view, which is far from frivolous, the Union had reneged on an agreement to refrain from altering the status quo in the very unit under consideration in bargaining discussions, and the Union's conduct added an additional complication to the disputes that they were trying to resolve.

In sum, the Employer did not withdraw its tentative proposal for recognition for unlawful reasons. Rather, it withdrew the bargaining proposal because the Union had violated an understanding between the parties as to how they would approach their pending disputes. Accordingly, in such circumstances, this Section 8(a)(1) allegation should be dismissed, absent withdrawal.

B.J.K.